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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

ROLAND R. PENNINGTON, JR. AND
JAMES M. DONNELL,

Petitioners,

v.

ANN D. MCLAUGHLIN, Secretary
of The United States Department of Labor,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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March 1988

QUESTION PRESENTED FOR REVIEW

Whether the Fifth Amendment and this Court's decision in *United States* v. *Armour,* 402 U.S. 673 (1971) permit a federal circuit court to enforce a purpose not embodied in a consent order in reversing a trial court's refusal to find contempt against a party to the consent order.

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OPINIONS BELOW

The opinion of the Fifth Circuit reversing the trial court's ruling that Petitioners were not in contempt of court is reported in *Dennis E. Whitfield* v. *Roland R. Pennington, Jr., et al,* 832 F.2d 909 (5th Cir. 1987).[1] *See* App. A *infra* at A-1. The Fifth Circuit's order denying Petitioners' motion for rehearing is set forth in Appendix B, *infra* at A-13. The trial court's orders denying respondent's motion for contempt

[1] Wesley E. Fox, James R. Rosier and the Retirement Plan for Employees of Control Specialties, Inc. are parties to the Consent Order involved in this case but are not parties to this Petition for Writ of Certiorari.

and motion to reconsider or vacate are unpublished. *See* Apps. C and D *infra* at A-14 and A-17, respectively.

JURISDICTION

Respondent filed a motion for contempt alleging that Petitioners had violated a Consent Order entered by the district court on August 29, 1985. *See* App. E *infra* at A-18. The district court orally denied the Motion for Contempt on October 17, 1986, and denied Respondent's Motion to Reconsider or Vacate on December 11, 1986. Respondent appealed to the Fifth Circuit Court of Appeals which reversed on November 25, 1987, and denied Petitioners' Motion for Rehearing on December 30, 1987.

Pursuant to 28 U.S.C. § 2101(c), Petitioners have applied for this writ of certiorari within ninety (90) days after the entry of judgment by the Fifth Circuit. Therefore, this Court has jurisdiction under 28 U.S.C. § 1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On August 29, 1985, the District Court entered an Order and Final Judgment ("Consent Order"), which consummated an investigation begun in 1979 by the Department of Labor. The investigation concerned a retirement fund (the "Plan") for employees of Control Specialties, Inc. ("CSI"), a company wholly owned by petitioner Pennington. The five-year investigation was followed by four months of negotiation during which the parties agreed on the terms of the Consent Order. Petitioners did not admit liability in the Consent Order.

The Consent Order required, *inter alia*, that (1) Pennington purchase from the Plan certain corporate stock that it held by making three installment payments of $100,538.67 and (2) Pennington and Donnell pay the Plan $140,000 in two installments of $46,667 and $55,224.96 (collectively described as the "Ordered Payments"). Pennington made the first $100,000 payment with checks drawn on a CSI account at BancTexas-Houston. Then, before the other Ordered Payments were due, BancTexas-Houston offset the same CSI account in an amount greater than the Ordered Payments. This offset occurred because the Plan Trustee failed to make payment on a note to the Bank guaranteed by CSI. The Plan, therefore, received the benefit of the offset.

The Trustee agreed to apply the offset funds to the Ordered Payment and refund the balance of the offset funds to CSI. Later, the Trustee informed Pennington that the Department prohibited him from fulfilling his agreement and the Secretary considered all of the Ordered Payments unpaid even though the Plan had received a benefit substantially in excess of the Ordered Payments.

The Secretary applied to the district court for a contempt order.[2] Following a hearing, the court orally denied the Secretary's motion. In so doing the court found that (1) the Plan has gotten what it bargained for; (2) the purpose of the pledge of paying the money was to secure the loan, not to put additional funds into the Plan; (3) the Secretary's argument is not contemplated by the Consent Order and (4) the Plan is where it ought to be financially. The district court denied the Secretary's motion to reconsider or vacate the judgment, and the Secretary appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit reversed, on the basis that the payment to the Plan was made pursuant to an agreement separate from the Consent Order and therefore did not satisfy the restitutionary design of the consent decree. This petition seeks relief from that reversal.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the construction of a Consent Order. The opinion of the Fifth Circuit conflicts with *United States* v. *Armour*, 402 U.S. 673 (1971), in which this Court held that a consent order must be construed without reference to its intent, design or purpose.

The Secretary's allegation of contempt depends on the improper assertion that, although the Plan received the benefit required by the letter of the Consent Order, Petitioners violated the restitutionary purpose of that Order. No such purpose is stated in the Consent Order. The Fifth Circuit's ruling, which rests on the Secretary's interpretation of the alleged purpose of the Consent Order, is directly forbidden by *Armour*. Attributing a "design" or restitutionary purpose to the Consent Order violates the conditions upon which Petitioners waived their right to litigate, and

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[2] The secretary invoked the district court's jurisdiction pursuant to paragraph 14 of the Consent Order and 28 U.S.C. § 1345.

therefore constitutes a denial of due process as guaranteed by the Fifth Amendment to the Constitution of the United States.

In *Armour,* this Court recognized that a party to a consent order has "waived his right to litigate the issue raised, a right guaranteed to him by the Due Process Clause," and, therefore, "the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." *Id.* at 682; *Accord, United States* v. *Atlantic Refining Co.,* 360 U.S. 19 (1959) and *Hughes* v. *United States,* 342 U.S. 353 (1952).

The Consent Order at issue was a result of compromise. Consequently, the scope of that order must be discerned within its four corners, and not by reference to the Secretary's interpretation of its purpose. The Secretary had the burden of proving by clear and convincing evidence that appellees did not make the payment required by the Consent Decree.

Contempt is a severe remedy and should not be granted when a fair ground of doubt exists that the defendant's conduct was wrongful. *California Artificial Stone Paving Co.* v. *Molitor,* 113 U.S. 609, 618 (1885). Consequently, the party moving for contempt must prove clearly and convincingly that a specific command in the consent decree was violated. *American Trucking Association, Inc.* v. *Interstate Commerce Commission,* 728 F.2d 254 (5th Cir. 1984); *United States* v. *Rizzo,* 539 F.2d 458, 465-66 (5th Cir. 1976). The "clear and convincing" standard is only one step removed from proof beyond a reasonable doubt. *Neely* v. *City of Grenada,* 799 F.2d 203, 207 (5th Cir. 1986); *Rizzo,* 539 F.2d at 465.

The Fifth Circuit did not accord the district court's weighing of the evidence with the deference required by the abuse of discretion standard. *Immigration and Naturalization Service* v. *Abudu*, 56 U.S.L.W. 4195 (U.S. March 1, 1988); *Founding Church of Scientology* v. *Webster*, 802 F.2d 1448 (D.C. Cir. 1986). The record establishes that the Plan received the benefit of the offset funds which were in excess of the Ordered Payments; the funds came from the same account as the previous uncontested Ordered Payment; the trustee of the Plan agreed that the offset funds met the Ordered Payments obligation and there was no other obligation to make payments to the Plan which was enforceable by the Secretary.

Given these facts, one permissible view of the evidence is the district court's finding that the payments required by the Consent Decree had been made. "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985). The district court clearly had "fair ground of doubt" that Petitioners failed to comply with the Consent Order.

The Secretary did not dispute that the Plan received a sum of money in excess of that owed in 1986 under the Consent Order. Nevertheless, the Secretary alleged that the money was received pursuant to a contribution agreement unrelated to the Consent Order. Rather than looking to the ample evidence supporting the district court's ruling, the Fifth Circuit, looking to evidence and allegations outside the four corners of the Consent Decree, concluded that the Petitioners' payments did not satisfy supposed restitutionary purpose of the Consent Order because those payments were made pursuant to another obligation. The Court of Appeals erred by attributing a purpose to the Consent Order outside its four corners.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Dennis E. WHITFIELD, Deputy Secretary of
United States Department of
Labor, Plaintiff-Appellant,

v.

Roland R. PENNINGTON, Jr., et al.,
Defendants-Appellees.

No. 87-2140.

United States Court of Appeals,
Fifth Circuit.

Nov. 25, 1987.

Rehearing Denied Dec. 30, 1987.

Appeal from the United States District
Court for the Southern District of Texas.

Before CLARK, Chief Judge, RANDALL
and DAVIS, Circuit Judges

RANDALL, Circuit Judge:

The Secretary of the United States Department of Labor appeals from the district court's denial of the Secretary's motion to reconsider or vacate the district court's earlier decision refusing to hold Roland R. Pennington, Jr. and James M. Donnell in civil contempt for refusing to make specified payments due under a consent order. As we find that the district court abused its discretion by failing to hold Pennington and Donnell in civil contempt, we reverse.

I.

A. The Consent Order

The instant appeal arises from proceedings initiated by the Secretary of the United States Department of Labor ("the

Secretary")[1] seeking civil contempt sanctions against Roland R. Pennington, Jr. ("Pennington") and James M. Donnell ("Donnell") for their failure to make certain payments required by a consent order.[2] In 1979, the Secretary began an investigation of the Retirement Plan for Employees of Control Specialties, Inc. ("the Plan")[3] pursuant to section 504 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Pennington is the Chairman of the Board and the holder of all the voting stock in Control Specialties, Inc. ("CSI"). Pennington and Donnell served as trustees of the Plan.[4] The investigation was completed by the end of July, 1984. On September 7, 1984, the Secretary informed Pennington and Donnell of the findings

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[1] In this opinion, we will use "the Secretary" to mean both the Secretary and the Department of Labor.

[2] The parties in this case both submitted stipulations of facts to the district court prior to its hearing on the Secretary's motion to find Pennington and Donnell in contempt. While the parties neglected to enter the stipulations into the record at the hearing, that oversight was corrected by a "Joint Motion for an Order admitting into evidence, *nunc pro tunc,*" the stipulations. On February 25, 1987, the district court granted the motion. Pennington and Donnell filed an unopposed motion to supplement the record by including the stipulations with this court on April 14, 1987, and we granted their motion. As did the district court, we rely on these stipulations.

[3] The Plan was established in 1978 as an employee benefit plan as contemplated by section 3(3) of ERISA, 29 U.S.C. §1002(3). Two other employee benefit plans, the Profit Sharing Plan for Employees of Control Specialties, Inc. and the Profit Sharing Plan for Employees of Elliott Valve Repair Company, a Division of Control Specialties, Inc., were merged with the Plan effective November 1, 1980 and March 1, 1981, respectively. The Plan is funded entirely through contributions from Control Specialties, Inc. ("CSI") as the Plan's sponsor. Benefits eventually provided to Plan participants are dependent on the amount of money contributed by CSI and any earnings the Plan may recover from the trustees' investment of these contributions. *See* 29 U.S.C. §1002(34).

[4] Other trustees of the Plan included Wesley E. Fox and James R. Rosier. They are not parties to this appeal.

of the investigation and offered them an opportunity to resolve the problems the investigation uncovered by agreeing to a consent decree. After months of negotiation, a complaint was filed with the United States District Court for the Southern District of Texas[5] and, on the same day, a proposed order and final judgment ("consent order"), signed by counsel for both parties, was submitted to the district court.

The complaint alleged that the trustees of the Plan had violated a number of the fiduciary and prohibited transaction provisions of ERISA. The relief sought included correction of the prohibited transactions and restitution to the Plan for losses incurred as a result of the trustees' alleged breaches of fiduciary duty. The consent order was submitted to the district court on April 17, 1985 and was entered on August 29, 1985. Among other things, the consent order required Pennington to purchase all common stock of the J. E. Lonergan Company, a former acquisition target of his, from the Plan for $301,616.02. Payment was to be made in three equal installments of $100,538.67, with payments due on June 1, 1985, March 1, 1986, and March 1, 1987. Moreover, Pennington and Donnell were jointly required to make restitution to the Plan in the amount of $140,000 with $46,667 due as an initial payment on June 1, 1985 and payments of $55,224.96 due on June 1, 1986 and June 1, 1987.

B. The Offset of CSI's Account

On February 15, 1983, the Plan obtained a $500,000 loan from BancTexas-Houston ("the Bank") for the purpose of

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[5] The district court had jurisdiction over the underlying dispute by virtue of section 502(e) of ERISA, 29 U.S.C. § 1132(e).

investing in long term residential mortgages.[6] On the same day, a guaranty of contribution was executed in which CSI guaranteed to the Bank that it would make annual contributions to the Plan in an amount not less than $150,000 per year until the loan was repaid. This guaranty of contribution gave the Bank the right to offset any amounts owing on the loan against CSI accounts with the Bank in the event that CSI failed to make the required contributions.[7] The Plan, in

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[6] The loan was included in the Secretary's investigation due to his determination that "the loan was imprudent to the extent that Pennington had caused the Plan to borrow the money at an interest rate then in the eighteen percent range in order to make mortgage loans (to various friends and acquaintances) at an interest rate of twelve percent." As a result, the consent order included a paragraph ordering Pennington to pay the Plan that portion of the interest payment on the loan that exceeded twelve percent. As the Secretary noted, at the time the investigation of the Plan was completed in late July of 1984, the Plan's payment on the loan was current and CSI had not yet defaulted in its obligation to contribute money to the Plan. Accordingly, no further breaches of fiduciary duty were alleged with respect to the loan, and restitution for the interest differential remained the sole remedial provision in the consent order.

[7] The guaranty contribution provided:

WHEREAS, BancTexas Houston ("Bank") has lent the sum of $500,000.00 to the Retirement Trust for Employees of Control Specialties, Inc. ("Trust") as evidenced by that certain Promissory Note dated February 15, 1983, in the amount of $500,000.00 ("Note"), the undersigned Control Specialties, Inc. ("Company"), for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, does hereby guarantee unto Bank that Company will contribute, or cause to be contributed, to the Trust annually during the term of the Note, an amount equal to not less than $150,000.00 per year, with the understanding that any and all such sums contributed, but in no event less than $150,000.00 per year, shall be applied in reduction of the Note.

Upon the breach by Company of this Guaranty, Bank may, without notice of any kind, any and all such notices being hereby expressly waived, take such action as is available at law or in equity, including, without limitation, offsetting any

turn, executed a negative pledge of its assets and agreed to apply any and all contributions from CSI toward payment of the loan. On March 9, 1983, CSI's board of directors resolved that CSI would contribute not less than $150,000 annually to the Plan until the loan obligation was discharged. On September 1, 1983, CSI contributed $150,000 to the Plan. This contribution was applied toward payment of the loan and, when combined with earlier payments by the Plan, resulted in a reduction in the principal balance to $300,000. By late 1985, the loan had been renewed twice and the principal had been reduced to $260,000. CSI failed to make its $150,000 contributions to the Plan in 1984, 1985, and 1986.

On November 20, 1985, the Bank advised MBank-Houston ("MBank"), the Plan's independent fiduciary,[8] that the Bank was amenable to allowing the note to remain past due until December 1, 1985. On December 15, 1985, MBank received $138,869.01 from a third party from the purchase of real estate owned by the Plan and made a $100,000 payment on the loan. After the payment was allocated between interest and principal, the principal balance stood at $174,953.61. Because CSI had failed to make the annual $150,000 contributions that it had guaranteed would be made to the Plan, the Bank exercised its option under the guaranty of contribution and offset CSI's corporate account in the amount of $179,580.49 on January 29, 1986.

On February 7, 1986, Pennington's counsel met with MBank representatives regarding the offset and agreed that

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amounts owing hereunder against any property of Company held on deposit in or by Bank.

[8] The consent order filed by the parties specified the selection of an independent fiduciary to administer the Plan's assets. On September 18, 1985, the district court appointed MBank as the independent fiduciary.

on March 1, 1986, the required date of a payment under the consent order, Pennington would be credited for the offset and would be refunded the difference between the amount due under the consent order and the amount of the offset. The agreement envisioned a $179,932.51 payment from MBank to CSI followed by a $101,390.22 payment to the Plan by Pennington. The Secretary determined that the Plan did not in fact owe CSI any money and disallowed the transaction.[9] On March 28, 1986, the Secretary advised Pennington's counsel that he considered all of the 1986 payment as unpaid and made formal demand for payment.[10]

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[9] On March 26, 1986, the Secretary wrote a letter to Marshall J. Shanklin, the MBank representative in charge of the Plan's account, outlining the Secretary's objections to the proposed arrangement. Aside from outlining a number of perceived ERISA violations in the transaction, the Secretary wrote:

> Moreover, it is our view, based upon the documents, that the Plan owes CSI no money. The Guaranty of Contribution provided that CSI would contribute to the Plan "annually during the term of the note" $150,000.00 per year, with the understanding that the contribution would be applied toward reduction of the note. By letter dated March 11, 1983, the Plan, in turn, agreed to apply all sums received as contributions "including, without limitation, annual contributions of at least $150,000.00 contemplated to be made by Control Specialties, Inc." toward reduction of the note. For at least the last two years, CSI has not made the annual $150,000 contribution required to be made by the Guaranty of Contribution, but has only made three small contributions totalling $36,000 in 1985 as outlined above. Accordingly, CSI has fallen short in its required contributions to the Plan by at least $264,000. Since the amount owed on the note, $179,932.51, is far less than the amount CSI was required but failed to contribute to the Plan, it is, in our view, clear that the Plan owes CSI nothing.

[10] The Secretary contends that Pennington failed to make the March 1, 1986 payment of $100,538.67 for the J. E. Lonergan stock and that Pennington and Donnel did not make the June 1, 1986 restitution payment of $55,224.96. In his petition for an order to show cause, the Secretary maintained that Pennington and Donnell had violated the consent order with

C. The District Court's Decision

On June 18, 1986, the Secretary applied to the district court "for an Order directing Roland R. Pennington, Jr. and James M. Donnell to appear and show cause why they should not be held in civil contempt of the [consent order]."[11] The district court ordered a hearing which was held on October 17, 1986. The Secretary's motion was denied at the close of the hearing. The district court did not issue an opinion nor did it specify its reasons for refusing to find Pennington and Donnell in civil contempt. Apparently, however, the district court concluded that the offset of CSI's corporate account by the Bank fulfilled Pennington's and Donnell's obligations under the consent order. On October 27, 1986, the Secretary timely filed a motion to reconsider or vacate the judgment under Federal Rule of Civil Procedure 59. This motion was denied without opinion by the district court on December 11, 1986 and notice of appeal from that decision was timely filed with this court on February 5, 1987.

The sole issue on appeal is whether the district court abused its discretion when it refused to hold Pennington and Donnell in civil contempt by apparently concluding that their personal obligations to make restitution to the Plan had been satisfied by the Bank's offset of CSI's corporate account.

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respect to the June 1, 1985 payments as well. However, the Secretary has abandoned that claim on appeal.

[11] The district court retained jurisdiction over the consent order in order to enforce its terms. 28 U.S.C. § 1345; Consent Order, Paragraph 14.

II.

A consent order, while founded on the agreement of the parties, is nevertheless a judicial act, enforceable by sanctions including a citation for contempt. *United States* v. *City of Miami*, 664 F.2d 435, 439-40 (Former 5th Cir. Dec. 1981) (en banc). A party may be held in contempt if he violates a definite and specific court order requiring him to perform or refrain from performing a particular act or acts with knowledge of that order. *Sec. and Exch. Comm'n* v. *First Financial Group of Texas, Inc.*, 659 F.2d 660, 669 (5th Cir. Oct. 1981). The civil contempt sanction is coercive rather than punitive and is intended to force a recalcitrant party to comply with a command of the court. *American Trucking Ass'n, Inc.* v. *Interstate Commerce Comm'n*, 728 F.2d 254, 255 (Former 5th Cir.), *cert. denied*, 469 U.S. 930, 105 S.Ct. 324, 83 L.Ed.2d 261 (1984); *see also Thyssen, Inc.* v. *S/S Chuen On*, 693 F.2d 1171, 1173-74 (5th Cir. 1982). Intent is not an issue in civil contempt proceedings; rather, the question is whether the alleged contemnors have complied with the court's order. *Jim Walter Resources* v. *Int'l Union, United Mine Workers of America*, 609 F.2d 165, 168 (5th Cir. 1980). In a civil contempt action, proof of contempt must be "clear and convincing." *United States* v. *Rizzo*, 539 F.2d 458, 465 (5th Cir. 1976). We review a district court's refusal to hold a party in civil contempt under an "abuse of discretion" standard. *Neely* v. *City of Grenada*, 799 F.2d 203, 207 (5th Cir. 1986).

The consent order clearly and unambiguously required Pennington and Donnell to make restitution to the Plan. Their obligation arose from their breaches of the fiduciary duty they owed to the Plan as trustees. They were charged with the responsibility of managing the Plan's assets. In carrying out that responsibility, they were found by the Secretary to have violated numerous provisions of ERISA.

The settlement agreement, later embodied in the consent order, was designed to rectify these violations by putting the Plan in the position it would have been in absent the trustees' breaches of their fiduciary duty. *See Katsaros* v. *Cody*, 744 F.2d 270, 281 (2d Cir.), *cert. denied*, 469 U.S. 1072, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984); *Gilliam* v. *Edwards*, 492 F.Supp. 1255, 1266-67 (D.N.J. 1980); *Freund* v. *Marshall & Ilsley Bank*, 485 F.Supp. 629, 644 n.7 (W.D. Wis. 1979).

The Secretary demonstrated to the district court, by undisputed evidence, a violation of the consent order. The record clearly reflects that Pennington did not make the $100,538.67 payment he was required to make to the Plan on March 1, 1986. Moreover, Pennington and Donnell did not make their joint payment of $55,224.96 to the Plan on June 1, 1986. Once a violation was demonstrated, the burden then fell on Pennington and Donnell to show either mitigating circumstances that might cause the district court to withhold the exercise of its contempt power, or substantial compliance with the consent order. *Louisiana Educ. Ass'n.* v. *Richland Parish School Bd.*, 421 F.Supp. 973, 977 (W.D. La. 1976), *aff'd* 585 F.2d 518 (5th Cir. 1977); *see United States Steel Corp.* v. *United Mine Workers of America, Dist. 20*, 598 F.2d 363, 368 (5th Cir. 1979). Pennington and Donnell failed to meet that burden. The Secretary demanded that the pair satisfy their financial obligations to the Plan. In response, Pennington and Donnell contended, and the district court apparently held, that they should be given credit for the CSI funds attached by the Bank. We cannot agree.

CSI was separately obligated to disburse funds to the Plan. CSI passed a corporate resolution through which it obligated itself to make yearly contributions of $150,000 to the Plan until the Bank's loan was repaid. CSI also executed a guaranty of contribution with the Bank reiterating its intention

to fund the Plan and giving the Bank the right to offset funds if the envisioned contributions were not made. The Bank attached CSI's account pursuant to the guaranty of contribution when CSI failed to make payments to the Plan in 1984, 1985, and 1986, as it had bound itself to do. There is nothing in the record to indicate that the Bank offset the CSI account in order to ensure compliance with the terms of the consent order. Moreover, it is clear that the Bank would have had no authority to enforce the consent order even if it had wanted to do so. Neither the Bank nor CSI was a party to the consent order. The offset, therefore, could not be linked with Pennington's and Donnell's obligations to correct prohibited transactions and make restitution to the Plan. The offset was an entirely separate transaction which could have no effect on obligations flowing from the consent order.[12]

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[12] On appeal, Pennington and Donnell maintain that the Secretary, by characterizing the offset of CSI's account as the fulfillment of a separate legal obligation, was seeking to have the district court adjudicate the rights and obligations of entities not bound by the consent order (CSI and the Bank). Moreover, Pennington and Donnell urge that the district court could not have accepted the Secretary's position without interpreting the terms of the loan agreement and the guaranty of contribution. Finally, they argue that the Secretary was, in effect, asking the district court to reform the terms of the consent order to effectuate an underlying, albeit unspecified, governmental purpose — a course the district court was powerless to embark on. *See United States* v. *Armour & Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971) (scope of consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties). We do not agree with this summary of the Secretary's position. Rather, we find that it was Pennington and Donnell who sought to modify the terms of the consent order by asking the district court to credit them with payments made by CSI under the guaranty of contribution. In order for the district court to credit them with the offset, it had to construe the consent order as either absolving CSI of its obligations under the guaranty of contribution or allowing Pennington and Donnell to take credit for the contributions. The Secretary is correct

Intimations to the effect that the Plan would suffer no loss if the offset was applied to Pennington's and Donnell's personal obligations were similarly misplaced. On appeal, Pennington and Donnell describe the money attached by the Bank as "Pennington's funds" in "Pennington's account." They argue that since the Plan had the use of "Pennington's funds" to satisfy a debt the Plan owed, they had complied with the mandates of the consent order. We find it misleading to characterize the CSI account as "Pennington's account." While Pennington may have had complete control over the CSI account by virtue of his position as sole shareholder and chairman of the board of the company, the account was not his personal account. The funds attached by the Bank pursuant to the guaranty of contribution were *CSI's*. While the distinction may be a subtle one, it is nevertheless a vital one. We are loathe to remove the veil of corporate identity as readily as Pennington might wish. The offset of CSI's account was a separate flow of funds into the Plan. If Pennington and Donnell had been compelled to make the restitution payments they owed, the offset would still have stood. In addition, the Plan might have a right of action against CSI for the balance of the contributions from 1984 through 1986. While we are in no position to judge the legal effect of the guaranty of contribution, neither was the district court. The district court, therefore, had no right to reduce the Plan's expected funding by the amount of Pennington's and Donnell's personal obligations.

The district court was bound to ensure that Pennington and Donnell complied with the restitution arrangement embodied in the consent order. Confronted by clear and convincing evidence of noncompliance by Pennington and

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in arguing that the language of the consent order does not support such a result and that the rights and obligations of CSI and the Bank could not be altered by the consent order.

Donnell, the district court nevertheless refused to exercise its contempt powers. Rather, it permitted Pennington and Donnell to bootstrap their personal obligations onto an unrelated transfer of funds. The district court clearly erred in failing to enforce the consent order through the imposition of the civil contempt sanction. Therefore, the district court abused its discretion by denying the Secretary's motion to reconsider or vacate its earlier refusal to hold Pennington and Donnell in civil contempt.

III.

For the foregoing reasons, we REVERSE and REMAND to the district court for the purpose of fashioning an appropriate order.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 87-2140

DENNIS E. WHITFIELD, Deputy Secretary of the United States Department of Labor,

Plaintiff-Appellant,

v.

ROLAND R. PENNINGTON, JR., ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(December 30, 1987)

Before CLARK, Chief Judge, and RANDALL and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above-entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ .....
United States Circuit Judge

APPENDIX C

THE COURT: BUT THE AGREEMENT TO MAKE THOSE CONTRIBUTIONS INTO THE PLAN WAS SIMPLY AN ADDITIONAL SECURITY TO THE BANK.

MS. HANDORF: IT WAS A CONDITION UPON WHICH THE LOAN WAS MADE TO THE BANK, RIGHT.

THE COURT: ONCE THE BANK IS PAID OFF, —

MS. HANDORF: HIS OBLIGATIONS UNDER THE LOAN IS FULFILLED. WE DON'T HAVE ANY QUESTION ABOUT THAT, THAT HIS OBLIGATIONS UNDER THE LOAN HAVE NOW BEEN FULFILLED TO THE BANK.

THAT, TO US, IS A SEPARATE LEGAL OBLIGATION NOW FULFILLED; BUT THAT DOESN'T MEAN BY FULFILLING THAT LEGAL OBLIGATION THAT HE GETS CREDIT BY FULFILLING IT, THAT HE NO LONGER HAS TO MAKE HIS PAYMENTS UNDER THE CONSENT ORDER; AND THAT'S, IN ESSENCE, WHAT HE'S ARGUING.

THE COURT: I CAN UNDERSTAND YOUR POINT OF VIEW. I JUST DON'T THINK THAT'S CONTEMPLATED BY THE CONSENT ORDER.

I THINK THE PLAN HAS GOTTEN WHAT IT BARGAINED FOR.

(Tr. p. 52, 11. 1-20).

* * *

THE COURT: AND THE PLAN IS WHERE IT OUGHT TO BE.

MS. HANDORF: NO, IT IS NOT WHERE IT OUGHT TO BE. IT IS MISSING THE PAYMENTS THAT ARE

OWED EITHER UNDER THE CONSENT ORDER OR UNDER THE TERMS OF THE LOAN AGREEMENT.

THE OFFSET EITHER WENT TO MAKING PAYMENTS UNDER THE LOAN AGREEMENT OR IT MADE PAYMENTS — IT CAN'T BE BOTH.

IT WOULD BE AS IF MR. PENNINGTON HAS MADE — HAD A LOAN WITH THE PLAN. IT HAD PAID OFF THE LOAN, AND HE ALSO GOT CREDIT FOR PAYING OFF THE LOAN —

THE COURT: IT'S EXACTLY AS IF MR. PENNINGTON HAD BORROWED MONEY AT THE BANK AND PROMISED TO PLEDGE TWO AUTOMOBILES AS SECURITY AND ONLY PLEDGED ONE. HE PAYS OFF THE NOTE, AND THEN SOMEBODY SAYS, WELL, YOU OUGHT TO PLEDGE THE OTHER AUTOMOBILE TOO. THE NOTE'S PAID OFF.

(Tr. p. 53, 11. 10-24).

* * *

THE COURT: THE PURPOSE OF THE PLEDGE OF PAYING THE MONEY WAS TO SECURE THE LOAN, NOT TO PUT ADDITIONAL FUNDS INTO THE PLAN.

MS. HANDORF: WELL, THAT IS A QUESTION —

MR. HOLTZMAN: THAT'S CORRECT.

MS. HANDORF: IF THAT IS TRUE, THAT'S A QUESTION TO BE RESOLVED UNDER ANOTHER FORUM. THAT'S A QUESTION AS TO WHAT THE TERMS OF THE GUARANTEE OF CONTRIBUTION —

(Tr. p. 54, 11. 2-9).

* * *

THE COURT: HE'S NOT IN CONTEMPT AT THIS POINT.

(Tr. p. 54, 11. 16).

* * *

THE COURT: ALL RIGHT. THEN WHAT I WILL DO IS SIMPLY HOLD TODAY THAT MR. PENNINGTON IS NOT IN CONTEMPT OF THE CONSENT DECREE.

IF THE SECRETARY WANTS TO REOPEN THE ISSUE OF THE HUNDRED FIFTY THOUSAND DOLLARS, IT'S UP TO THE SECRETARY.

(Tr. p. 56, 11. 18-33).

* * *

THE COURT: IF YOU WANT TO MOVE TO AMEND YOUR PLEADINGS OR SET ASIDE THE CONSENT, THAT'S UP TO YOU.

MS. HANDORF: FINE. THANK YOU.

THE COURT: ALL RIGHT.

I UNDERSTAND YOUR POINT OF VIEW.

YOUR MOTION FOR CONTEMPT IS DENIED, AND I THANK YOU ALL VERY MUCH.

(Tr. p. 58, 11. 10-16).

APPENDIX D

IN THE

United States District Court

FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WILLIAM E. BROCK, Secretary
of the United States
Department of Labor

vs.

Civil Action
No. H-85-01858

ROLAND R. PENNINGTON, JR.,
et al.,

Defendants.

ORDER

Plaintiff, the Secretary of Labor, has made a motion to reconsider and/or vacate the judgment entered herein. The motion is DENIED.

SO ORDERED.

Done at Houston, Texas, this 11th day of December, 1986.

/s/.....

NORMAN W. BLACK
United States District Judge

APPENDIX E

IN THE

United States District Court

FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAYMOND J. DONOVAN,
Secretary of the United
States Department of Labor

vs.

ROLAND R. PENNINGTON, JR., WESLEY E. FOX, JAMES R. ROSIER, JAMES M. DONNELL, and THE RETIREMENT PLAN FOR THE EMPLOYEES OF CONTROL SPECIALTIES, INC.,
Defendants.

Civil Action
No. .....

ORDER AND FINAL JUDGMENT

The Secretary of the United States Department of Labor ("the Secretary") filed a Complaint in this civil action pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, alleging certain violations of ERISA by Roland R. Pennington, Jr., Wesley E. Fox, James R. Rosier, and James M. Donnell as fiduciaries of the Retirement Plan for Employees of Control Specialties, Inc. ("the Plan"). The Plan, which is an employee benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3), is also named in the Complaint as a party necessary to effect complete relief.

Defendants have waived the requirements of Rule 4, Federal Rules of Civil Procedure, as to the service of summons upon them and have acknowledged receipt of plaintiff's Complaint. By consenting to this order, defendants have admitted to the jurisdiction of this Court over the parties and the subject matter of this action. The defendants have agreed to the entry of this order as a final adjudication of the claims asserted by the plaintiff without filing any answer to the Complaint or admitting or denying any of the substantive allegations contained herein.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Defendants Roland R. Pennington, Jr. and James M. Donnell resign as fiduciaries of the Plan and shall not serve as trustees or in any other fiduciary capacity with respect to the Plan or to any other employee benefit plan for a period of ten years from the date of the entry of this Order. Defendants Wesley E. Fox and James R. Rosier shall not serve as trustees or in any other fiduciary capacity with respect to the Plan or any other employee benefit plan for a period of ten years from the date of the entry of this Order.

2. An independent fiduciary shall be appointed by the Court to serve in the capacity of trustee with sole authority to manage the assets of the Plan in accordance with the requirements of the Plan and ERISA. Within thirty days of entry of this Order, the parties will propose to the Court the name of an independent fiduciary. In the event that the parties are unable to agree on the selection of an independent fiduciary, the names of proposed independent fiduciaries shall be submitted to the Court, and the independent fiduciary shall then be chosen by the Court. The independent fiduciary shall obtain all necessary bonding as required by ERISA § 412, 29 U.S.C. § 1112.

3. In the event that the independent fiduciary appointed by the Court shall resign or be dismissed at any time prior to March 1, 1995, the Retirement Committee of the Plan shall appoint a new independent fiduciary, subject to the prior approval of Plaintiff. At least thirty (30) days prior to the resignation or dismissal of the independent fiduciary, the Retirement Committee shall submit in writing to the Secretary of Labor, by his designee, the Plan Benefits Security Division, Office of the Solicitor of Labor (the "Department"), the name of a proposed independent fiduciary. The Department may, within fifteen (15) business days after receipt of a proposal for an independent fiduciary, request additional information regarding the proposed independent fiduciary, and the Retirement Committee shall furnish such information within fifteen (15) business days after the Department's request. Within fifteen (15) business days after the Department's receipt of the additional information, or, if no additional information has been requested, the Department may object to the proposed independent fiduciary. If the Department does not object to the proposed independent fiduciary, the Retirement Committee shall retain the independent fiduciary upon such fiduciary's acknowledgement in writing that he is a fiduciary of the Plan. In the event that the parties are unable to agree on the selection of an independent fiduciary, the names of proposed independent fiduciaries shall be submitted to the Court, and the independent fiduciary shall then be chosen by the Court. The independent fiduciary shall obtain all necessary bonding as required by ERISA § 412, 29U.S.C. § 1112.

4. Defendants shall cooperate with the independent fiduciary, including but not limited to, turning over all Plan assets in their possession or control to the independent fiduciary and providing the independent fiduciary with

information related to the operation and the assets of the Plan upon request.

5. Defendant Roland R. Pennington, Jr. shall purchase all common stock held by the Plan in the J. E. Lonergan Company at the price of $301,616.02. Defendant Pennington shall make payment for this purchase as follows: on or before June 1, 1985, defendant Pennington will make an initial payment to the Plan of $100,538.67 for the stock, and will make two additional payments of $100,538.67 each on or before March 1, 1986 and March 1, 1987. Until the entire sum is paid, the balance owing shall bear an interest rate of 12 percent per annum. On or before March 1, 1987, defendant Pennington will also pay an additional amount of all accrued interest plus the sum of $57,010.85 which represents the opportunity cost to the Plan. At the time of the initial payment, defendant Roland R. Pennington, Jr. will enter into an agreement with the Plan pledging the shares of the J. E. Lonergan Company common stock as collateral for all the payments required under this paragraph.

6. If, by June 1, 1985, the Plan has not received $110,000 in payment for the property located at 4608 Eden Street in Philadelphia, Pennsylvania plus 12 percent per annum interest thereon from March 9, 1983 until the date of payment to the Plan, defendant Roland R. Pennington, Jr. shall pay $142,478.19 to the Plan by making an initial payment of $30,000 on June 1, 1985, and by paying, on the first business day of each month, the remainder in nine equal monthly installments of principal and interest of $13,130.74.

7. If, by June 1, 1985, Marcus Faubion has not repurchased the shares of Northshore Bank common stock purchased on December 6, 1982 from him by the Plan for the original purchase price of $25,000 plus 12 percent per annum interest thereon from the date of sale to the Plan to

the date of purchase from the Plan, defendant Roland R. Pennington, Jr. shall pay $33,353.32 to the Plan for purchase of the shares of Northshore Bank common stock.

8. In the event that defendant Roland R. Pennington, Jr. is required to make the payment contained in paragraph 7, defendant Pennington shall make an initial payment to the Plan of $10,000 on June 1, 1985, and shall pay the remaining balance in nine equal monthly installments, including interest at the rate of 12 percent per annum, on the first business day of each month.

9. Defendants Roland R. Pennington, Jr. and James M. Donnell jointly and severally shall pay the Plan $140,000 according to the following schedule: $46,667 to be paid by June 1, 1985, and the remaining balance shall be paid in two installments of $55,224.96. The first installment payment shall be due on or before June 1, 1986 and the final installment payment shall be due on or before June 1, 1987. Defendants Wesley E. Fox and James R. Rosier agree to pay the Plan $10,000 each by June 1, 1985.

10. Defendant Roland R. Pennington, Jr. shall pay to the Plan, within ten days of the Plan's quarterly payment to the BancTexas-Houston on note #84829, that portion of the interest payment that exceeds 12 percent, until such loan is fully repaid.

11. If the independent fiduciary for the Plan determines within three years from the entry of this Order that the Plan should sell the 31.46 acres of property it owns at Boone Lake, the property shall not be sold without permission of the Court for less than the "recoupment sales price", which shall be defined as the original purchase price ($337,475.73) plus a 12 percent per annum return compounded yearly from the date of the purchase by the Plan, plus any reasonable sales commission. In the event that the independent fiduciary attempts, but is unable, to sell the Boone Lake

property for the sales price within the three year period, the property may thereafter be sold by the independent fiduciary in his discretion and defendant Roland R. Pennington, Jr. shall pay, at the time of the closing on the sale of the property, the difference between the sales price and any lesser amount the Plan obtains from the sale.

12. Defendant Roland R. Pennington, Jr. shall indemnify, save, and hold the Plan harmless for all losses incurred by the Plan as a result of any default in payment of principal or interest on the following loans made by the Plan:

a. The $10,000 loan made on September 20, 1980 to Paul Bianchi;

b. The $125,000 loan made on April 12, 1983 to Graves Office Supply;

c. The $18,000 loan made on April 19, 1984 to C&G Fasteners; and

d. The $67,730 loan made on January 13, 1984 to McClarty and Associates.

The Court shall retain jurisdiction over this matter for the purpose of enforcing this Order.

IT IS SO ORDERED

Dated: .....

.....

United States District Judge

The parties, by their undersigned counsel, hereby consent to the entry of this Order.

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